UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID ENGELSTEIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants.

C20-0916 TSZ

ORDER

THIS MATTER comes before the Court on Defendant United States of America's motion to dismiss for lack of subject matter jurisdiction, docket no. 124, and motion to strike, docket no. 173. The Court having previously entered a Minute Order, docket no. 175, granting the motion to dismiss and denying the motion to strike, now enters the following order explaining its reasoning.

Overview

On June 18, 2017, Plaintiff David Engelstein was riding his bicycle on the Middle Fork Road (the "Road") in North Bend, Washington. Second Am. Compl. ("SAC") at ¶ 5.1 (docket no. 58); Ex. C to Johnson Decl. at 2 (docket no. 125-3). At the time of Engelstein's bike ride, the Road was under construction pursuant to the Middle Fork

Snoqualmie River Road Reconstruction Project (the "Project"). A portion of the Road was constructed of grate panels. SAC at ¶ 5.1. Engelstein alleges that, while crossing over the grate surface, he fell because his bike tire got wedged within a gap between the grate panels and he sustained serious injuries. *Id.* at ¶ 5.2.

A. The Middle Fork Snoqualmie River Road Reconstruction Project

The Road is owned by King County (the "County"). *See* Ex. A to Johnson Decl. at 2–6 (docket no. 125-1); Pl.'s Resp. Br. at 2 & 8 (docket no. 149). The Road was under construction pursuant to a contract between the Federal Highway Administration ("FHWA"), the United States Forest Service (the "Forest Service"), the County, and Active Construction, Inc. ("ACI"). Following a study on the impact of paving the Road, the FHWA, the Forest Service, and the County agreed to reconstruct approximately 9.7 miles of the Road. *Id.*; *see also* Ex. B to Johnson Decl. at 1 (docket no. 125-2), Ex. C to Johnson Decl. at 1–3. The FHWA solicited bids for the Project and ultimately awarded a contract for the Project to ACI (the "Contract"). Ex. D to Johnson Decl. at 1–2 (docket no. 125-4).

The Contract tasked ACI with constructing a 20-foot paved roadway, reconstructing two bridges and replacing one bridge with a culvert, replacing numerous existing roadway culverts, and upgrading signing and other roadside safety features. Ex. B to Johnson Decl. at 1. The Contract also called for ACI to design, manufacture, and install low water crossings. Ex. D to Johnson Decl. at 56–59; Ex. E to Johnson Decl. at 1–49 (docket no. 125-5). Specifically, the Contract provided that ACI would design, manufacture, and install "precast reinforced concrete box culverts and associated curb

headwalls, stem walls, and wing walls according to layouts and requirements shown on the plans." Ex. D to Johnson Decl. at 56. The work also consisted of "designing and constructing three-sided concrete trench drains with removable steel grates according to layouts and requirements shown on the plans." *Id.*

When designing the low water crossings, the FHWA and ACI had to consider certain regulations, administrative guidance documents, and policy manuals, many of which served as non-mandatory guidance for the designers and engineers. *See* Exs. H–K to Johnson Decl. (docket nos. 125-8–125-11). A separate agreement between the federal agencies and King County stated that the low water crossings would be designed in accordance with the American Association of Highway and Transportation Officials ("AASHTO") specifications. Ex. A to Johnson Decl. at 3. In addition, the Contract incorporated the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects ("Standard Specifications"), and it supplemented the Standard Specifications with specific language tailored to the Project. Ex. D to Johnson Decl. at 29–32; Ex. G to Johnson Decl. (docket no. 125-7). The Standard Specifications required contractors to "[p]repare drawings as necessary to construct the work[,]" furnish the drawings "for acceptance before performing work covered by the drawings[,]" and "[o]btain written approval before changing or deviating from the accepted drawings." Ex. G to Johnson Decl. at 17. The Contract supplemented the Standard Specifications by identifying specific drawings that ACI was required to prepare and submit for the Project, which included drawings for the low water crossings. Ex. D to Johnson Decl. at 35–37.

Prior to construction, ACI and its subcontractor, OldCastle Precast ("OldCastle"), submitted design drawings for the low water crossings to the FHWA and the County for approval. Ex. E to Johnson Decl. at 1–5. The FHWA, the Forest Service, and the County approved these designs in June 2014. *Id.* In August 2014, Oldcastle and ACI submitted additional drawings with additional detail regarding the grates, knowing that the Washington Department of Transportation ("DOT") would inspect them. *Id.* at 31–34. The FHWA and the County approved the supplemental designs in August 2014. *Id.* at 35–49.

After the final design plans were approved, OldCastle manufactured, and ACI installed, the low water crossings.[1] The Contract provided that "at all times during performance" of the Project "and until the work is completed and accepted, [ACI] shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the [FHWA] and has authority to act for [ACI]." Ex. D to Johnson Decl. at 23. ACI was also responsible for obtaining its own permits, licenses, materials, and equipment. *Id.* at 23. In addition, ACI agreed to assume all responsibility for injuries arising as a result of its own negligence. *Id.*

The Standard Specifications contained provisions regarding construction of the Project. Specifically, the Standard Specifications provided that ACI was required to "[i]ndemnify and hold harmless the Government, its employees, and its consultants from

[1] In a previous order, the Court dismissed plaintiff's claims against ACI and OldCastle because they were joined as defendants after the three-year statute of limitations had expired and neither tolling nor relation-back doctrines applied. Order at 9–10 (docket no. 90).

suits; actions; or claims brought for injuries or damage received or sustained by any person, persons, or property resulting from the construction operations arising out of the negligent performance of the contract." Ex. G to Johnson Decl. at 36, § 107.05. In addition, the Standard Specifications state that during "the performance of the contract, the Contractor is an independent contractor and neither the Contractor nor anyone used or employed by the Contractor shall be an agent, employee, servant, or representative of the Government." *Id.* at 37, § 107.09. The Standard Specifications also state "[s]ubcontracting does not relieve the Contractor of liability and responsibility under the contract and does not create any contractual relation between subcontractors and the Government. The Contractor is liable and responsible for any action or lack of action of subcontractors." *Id.* at 39, § 108.02.

By June 2017, the time of Engelstein's accident, the Project neared completion. Construction was ongoing, although not on the grates at issue. On July 10, 2017, the FHWA deemed the project substantially complete, and relieved ACI of its maintenance responsibilities. Ex. C to Johnson Decl. at 1; Ex. F to Johnson Decl. at 1 (docket no. 125-6). ACI finished work on the project in December 2017.[2]

[2] The SAC is ambiguous as to whether ACI installed the grates at issue or whether the grates preexisted the construction. *See* SAC at ¶ 5.4. Regardless, in a June 30, 2023, status conference, the parties agreed that ACI installed the subject grates prior to the accident.

B. Engelstein's Claims

Engelstein asserts that the United States is liable for his injuries under the Federal Tort Claims Act ("FTCA").[3] SAC at ¶¶ 4.6 & 6.1. Engelstein alleges that the United States was negligent because the low water crossing grates were improperly constructed, installed, and maintained, which led to his injuries. SAC at ¶ 5.3; Pl.'s Resp. Br. at 8. Engelstein also appears to allege that the United States negligently approved the design of the grates. SAC at ¶ 5.3; Nordstrom Report at 9 (docket no. 144-3) ("[T]he grate panel gaps could not have been eliminated in the field either at the time of installation or after the subject accident and were effectively 'designed into' the assembly."). In sum, Engelstein seeks to impose vicarious liability on the United States for a contractor's allegedly negligent construction, installation, and maintenance of the grates, and direct liability for the United States' negligent approval of the design for the grates.

The United States contends that this Court lacks subject matter jurisdiction under the doctrine of sovereign immunity. Although the FTCA generally waives sovereign immunity for negligence claims, the United States argues that sovereign immunity applies in this case because of two exceptions to the FTCA's waiver: the independent contractor exception and the discretionary function exception.

[3] The named federal defendants include the United States Department of Agriculture, United States Forest Service, United States Department of Transportation, United States Department of Highways, United States Federal Highway Administration, and the Western Federal Lands Highway Division of the FHWA. SAC at 1 & ¶¶ 2.1–2.5. This Order refers to the federal defendants collectively as the "United States."

Discussion

A. The United States' Motion to Strike

On July 31, 2023, Plaintiff filed a supplemental response, docket no. 171, to the United States' motion to dismiss, along with the Declaration of Greg Gebhard, docket no. 170. The United States filed a motion, docket no. 173, to strike Plaintiff's supplemental response and the Gebhard Declaration pursuant to FRCP 12(f). Def.'s Mot. to Strike at 1 (docket no. 173). The United States' motion to strike, docket no. 173, was previously denied by Minute Order, docket no. 175, for the following reasons. Motions to strike are disfavored "and 'should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more parties.'" *Johnson v. U.S. Bancorp*, No. C11-02010, 2012 WL 6615507, at *7 (W.D. Wash. Dec. 18, 2012) (citation omitted). The Court considered Engelstein's supplemental response because it finally addressed in part the issues presented by the United States' motion to dismiss.[4]

The Court also considered the Declaration of Greg Gebhard to the extent it presents any admissible evidence. Although motions to strike under Rule 12(f) are

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[4] The United States filed its motion to dismiss on May 4, 2023, and the motion was originally noted for May 26, 2023. Engelstein requested additional time to complete discovery and to respond to the motion to dismiss. Pl.'s Mot. to Reset Discovery and Related Deadlines (docket no. 132); Notice of Mot. Renoted (docket no. 137). The motion to dismiss was renoted for June 16, 2023. Min. Entry (docket no. 138). On June 13, 2023, Engelstein filed a response to the motion to dismiss. Pl.'s Resp. Br. (docket no. 149). Engelstein subsequently filed an additional motion for extension of time to complete discovery and a motion for additional time to further respond to the motion to dismiss. Pl.'s Mot. to Extend Discovery Deadline (docket no. 152); Pl.'s Mot. for Extension of Time (docket no. 157). The Court permitted Engelstein to conduct additional depositions and to file a supplemental response. Min. Entry (docket no. 161). The motion to dismiss was renoted for July 28, 2023. *Id.* On July 31, 2023, Engelstein filed a supplemental response to the motion to dismiss. Pl.'s Supp. Resp. Br. (docket no. 171). In the supplemental response, Engelstein addressed for the first time whether ACI was an independent contractor for purposes of the FTCA.

limited to pleadings, motions to strike materials that are not part of the pleadings can be construed as an invitation "to consider whether the [proffered material] may properly be relied upon." *Nat. Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1161–62 (E.D. Cal. 2008) (citations omitted) (alteration in original). On numerous occasions in his declaration, Gebhard qualifies his statement with phrases such as "I believe" or "it is my understanding." Gebhard Decl. at 2–4 (docket no. 170). Such statements raise doubts as to Gebhard's personal knowledge. *Compare Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, No. CV 05-2200, 2008 WL 11334030, at *15 (C.D. Cal. Mar. 17, 2008) ("Declarations based on information and belief, rather than on personal knowledge, are insufficient to create a genuine issue of material fact." (citations omitted)), *with Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (noting that facts alleged on belief or understanding do not create a genuine issue of fact but personal knowledge "can be inferred from a declarant's position with a company or business"). Bearing this issue in mind, the Court considered the admissible portions of the Gebhard Declaration and gave them the appropriate weight.

B. The United States' Rule 12(b)(1) Motion

A Rule 12(b)(1) motion seeks dismissal of a claim for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). When responding to factual attacks on subject matter jurisdiction,[5] plaintiffs "must present 'affidavits or any other evidence necessary

[5] Here, the United States makes only a factual attack and does not assert a facial challenge to the Court's jurisdiction.

to satisfy [their] burden of establishing that the court, in fact, possesses subject matter jurisdiction.'" *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (alteration in original, quoting *Colwell v. Dep't of Health & Hum. Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009)). The Court "may look beyond the pleadings to the parties' evidence without converting the motion to dismiss into one for summary judgment." *Id.* (citing *White v. Lee*, 277 F.3d 1214, 1242 (9th Cir. 2000)). When "evaluating the evidence, the court 'need not presume the truthfulness of the [plaintiff's] allegations.'" *Id.* (quoting *White*, 277 F.3d at 1242). "Any factual disputes, however, must be resolved in favor of [the plaintiff]." *Id.* (citing *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996)).

The FTCA contains a "limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). Because suit can be brought against the United States "only to the extent that it has waived its immunity," courts must carefully heed exceptions to any such waiver. *Id.* at 814. The United States' assertion that, in this case, the independent contractor and discretionary function exceptions deprive the Court of jurisdiction presents threshold questions severable from the merits of the case, which are appropriately decided under Rule 12(b)(1). *Clemons v. United States*, No. 2:21-CV-09194, 2022 WL 4596651, at *1 (C.D. Cal. July 7, 2022). Although Plaintiff has the burden of persuading the Court that it has subject matter jurisdiction, "the United States bears the burden of proving the applicability of one of the exceptions to the FTCA's general waiver of

immunity." *Prescott v. United States*, 973 F.2d 696, 703 (9th Cir. 1992). The Court addresses each exception asserted by the United States.

a. Independent Contractor Exception

The independent contractor exception to the FTCA's waiver of immunity bars liability against the United States in instances where the conduct in question was perpetrated by "any contractor with the United States." 28 U.S.C. § 2671. The United States "cannot be held vicariously liable for the negligence of an employee of an independent contractor." *Yanez v. United States*, 63 F.3d 870, 872 (9th Cir. 1995) (citations omitted). To determine if the independent contractor exception applies, courts distinguish a federal employee from a contractor by evaluating "the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor." *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983); *see also Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993); *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). A determination that the independent contractor exception applies is not, however, the end of the analysis. *Edison*, 822 F.3d at 518. Courts must also evaluate "whether [the plaintiff] alleged a separate nondelegable or undelegated duty, which the United States could be held directly liable for breaching." *Id.* "Only upon a finding that the government delegated its *entire* duty of care may the court dismiss the claim for lack of jurisdiction under the FTCA's independent contractor exception." *Id.* (emphasis in original). The Court addresses whether the United States may be held vicariously liable for ACI's negligence or directly liable for breaching a nondelegable duty.

i. Independent Contractor or Federal Employee

The United States argues that ACI was an independent contractor and that the United States cannot be vicariously liable for ACI's allegedly negligent construction, installation, or maintenance of the low water crossing grates. The United States asserts that it did not have "authority to control and supervise the 'detailed physical performance' and 'day to day operations'" of ACI.[6] *See Autery*, 424 F.3d at 956 (quoting *Hines v. United States*, 60 F.3d 1442, 1446 (9th Cir. 1995)); *see also Ducey*, 713 F.2d at 516. The United States may use detailed contractual provisions to "'fix specific and precise conditions to implement federal objectives' without becoming liable for an independent contractor's negligence." *Autery*, 424 F.3d at 957 (quoting *Orleans*, 425 U.S. at 816). "[D]etailed regulations and inspections are [not] evidence of an employee relationship." *Id.* (alterations in original, quoting *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987)). An individual may be deemed "acting as a government employee" only if the United States exercised "substantial supervision over the day-to-day operations of the contractor." *Id.* (quoting *Letnes*, 820 F.2d at 1519).

Here, analogous cases teach that, given the structure of ACI's and OldCastle's relationship with the FHWA, the two entities fall neatly into the categories of independent contractor and subcontractor, respectively. *See Clemons*, 2022 WL 4596651, at *1–3 (describing the United States as forming contractor and subcontractor

[6] Federal law determines whether ACI was an independent contractor or federal employee. *Autery*, 424 F.3d at 957 (citing *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995)).

relationships where the contractor was responsible for daily supervision of the subcontractor's janitorial services); *Marcus v. United States*, No. 96CV97, 1997 WL 1051847, at *1 (E.D. Va. May 29, 1997) (recommending dismissal based on the independent contractor exception in a case involving a similar FHWA contract for road resurfacing and a similar bicycle accident). In *Marcus*, the plaintiff was riding his bicycle on a parkway, which was owned by the United States. 1997 WL 1051847, at *1. The plaintiff was injured when the bicycle's front tire "slipped into an expansion joint" between concrete slabs on a portion of the parkway that was under repair. *Id.* At the time of the plaintiff's bicycle accident, Century Concrete, Inc. ("Century") was resurfacing the parkway pursuant to a FHWA-awarded contract. *Id.* The plaintiff asserted that Century created the dangerous condition during the resurfacing and that the United States negligently failed to warn of the dangerous condition and allowed it to continue. *Id.* Looking to the contract between the United States and Century, the court determined that Century was not an agent or employee of the United States, and thus, the United States was not liable for Century's actions. *Id.* at *2–3. The court noted the contract stated that "[a]t all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work." *Id.* at *1 (alteration in original). The contract also provided that Century was responsible "for obtaining all permits and licenses, providing a safe work environment, and . . . all materials delivered and work performed until completion and acceptance of the entire

project."[7] *Id.* at *3. Furthermore, the record contained no evidence or allegation that the United States controlled Century's day-to-day physical operations. *Id.* Thus, the court concluded that it did not have jurisdiction. *Id.*

Similarly here, the Contract establishes that the United States was not responsible for ACI's day-to-day operations. Like the contract in *Marcus*, the Contract in this case states that "[a]t all times during performance" of the Project "and until the work is completed and accepted, [ACI] shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the [FHWA] and has authority to act for [ACI]." Ex. D to Johnson Decl. at 23. In addition, ACI was responsible for obtaining its own permits, licenses, materials, and equipment. *Id.* at 23. ACI also agreed to assume all responsibility for injuries arising as a result of its own negligence.[8] *Id.* Thus, as in *Marcus*, ACI was an independent contractor for, rather than an agent or employee of, the United States.

In a supplemental response, Engelstein suggests ACI was not an independent contractor because the United States was "intimately involved on a daily basis with

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[7] In the Background section, the *Marcus* Court pointed out that the contract between the United States and Century "contained an accident prevention clause which required Century to, among other things, 'safeguard the public and government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities' and 'provide appropriate safety barricades, signs, and signal lights.'" 1997 WL 1051847, at *1. The contract also provided that Century "would be 'responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence.'" *Id.*

[8] The Standard Specifications, which were incorporated into the Contract, provide that ACI was required to indemnify the United States from suits brought for injuries or damage sustained as a result of negligent performance of the Contract. Ex. G to Johnson Decl. at 36, § 107.05. In addition, the Standard Specifications explicitly state that ACI is an independent contractor for, and not an agent or employee of, the United States. *Id.* at 37, § 107.09. The Standard Specifications further provide that ACI is liable for any action or inaction of subcontractors. *Id.* at 39, § 108.02.

managing the contractor's performance in conformity with the Project contract."[9] Pl.'s Supp. Resp. Br. at 7 (docket no. 171). Plaintiff's argument is misplaced because nothing in the record indicates that the United States substantially supervised ACI's day-to-day operations such that ACI was not an independent contractor. Although Engelstein points out that the United States had a project engineer on site daily during construction, *see* Traffalis Dep. at 24:5–9 & 60:18–24 (docket no. 162-2); Gebhard Decl. at ¶¶ 7–8 (docket no. 170), the presence of federal employees does not establish that the United States exercised substantial supervision over ACI's physical performance of the contract. *See Hsieh v. Consol. Eng'g Servs., Inc.*, 569 F. Supp. 2d 159, 178 (D.D.C. 2008) (finding that the federal government did not exercise detailed control or day-to-day supervision of a contractor's physical performance of a contract even though federal "personnel were out 'on the street' every day," and "performed routine inspections" because the contract provided the federal government with the right the inspect the contractor's work). As in *Hsieh*, in this case, the record does not demonstrate that the federal government's on-site project engineer was there to manage ACI's day-to-day operations such as how and when to do the work. Instead, the federal government's project engineer was on-site to ensure ACI's compliance with certain standards and the Contract itself, as required by the separate agreement between the federal agencies and King County. *See* Ex. A to Johnson Decl. at 6.[10] In sum, the Contract provides that ACI was responsible for its own daily

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[9] Engelstein did not make this argument in his initial response. *See* Pl.'s Resp. Br. at 6 (docket no. 149).

[10] The Forest Highway Project Agreement for Middle Fork Snoqualmie River Road stated: "During the construction phase of the project, [the Western Federal Lands Highway Division] will provide a Project

tasks and supervision. Ex. D to Johnson Decl. at 23. Indeed, ACI was responsible for constructing, installing, and maintaining the grates that allegedly caused Engelstein's injuries. *See* Ex. E to Johnson Decl. at 33–49. Thus, the independent contractor exception applies, sovereign immunity has not been waived, and the Court lacks jurisdiction over Engelstein's claim that the low water crossing grates were negligently constructed, installed, or maintained.

ii. Nondelegable Duty

Notwithstanding ACI's status as an independent contractor, the Court must determine whether the United States may be held directly liable for breaching a nondelegable or undelegated duty. *Edison*, 822 F.3d at 518. Engelstein argues that the United States is directly liable because it owed him a nondelegable duty of safety. Pl.'s Resp. Br. at 7 (quoting *Edison*, 822 F.3d at 518); Pl.'s Supp. Resp. Br. at 1–2, 7. "Whether the United States may be held liable under the FTCA for its own acts or omissions is a three-step inquiry." *Edison*, 822 F.3d at 519. First, courts determine whether state law "would impose a duty of care on a private individual in a similar situation." *Id.* (citations omitted). Second, if state law would impose such duty, courts "then look to the contract and the parties' actions to determine whether the United States retained some portion of that duty for which it could be held directly liable." *Id.* (citations omitted). Third, "even if it appears that the government delegated all of its

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Engineer to oversee and inspect the work, and to ensure a quality product that meets all applicable Federal, State and Local Standards and environmental requirements." Ex. A to Johnson Decl. at 6.

duties to the independent contractor, we ask whether [state] law would impose any *nondelegable* duties on the government."[11] *Id.* (citations omitted) (emphasis in original).

Engelstein cites the abnormally dangerous and/or peculiar risk exceptions to the general rule that a principal is not liable for injuries caused by an independent contractor.[12] Pl.'s Resp. Br. at 4, 7, 13, 20, 22. In the alternative, Engelstein argues that landowner-premises liability applies to this case, thus attaching a nondelegable duty of safety. These exceptions do not apply to the facts of this case.[13]

First, under Washington law, the act of reconstructing a road or installing a low water crossing is not an abnormally dangerous activity and does not pose a peculiar risk. *See Schuck v. Beck,* No. 36754-1-III, 2020 WL 1922774, at *5 (Wash. Ct. App. Apr. 21, 2020) (setting forth the six factors outlined in Section 520 of the Restatement (Second) of Torts that should be considered in determining whether an activity is abnormally dangerous and holding that transporting pressurized hazardous material to aid in the

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[11] The second step of the *Edison* analysis is not relevant in this case because the Court finds that the United States has delegated all of its duties to ACI regarding constructing, installing, and manufacturing the grates. *See Lentz v. United States Air Force*, No. CV-17-1660, 2018 WL 3416993, at *4 (D. Ariz. July 13, 2018) (finding that the second step of the *Edison* analysis was irrelevant after the court determined that the United States delegated all of its duties to an independent contractor). As in *Lentz*, however, the Court analyzes Engelstein's claim that, under the third step of the *Edison* analysis, the United States should be held liable because Washington law imposes on it a nondelegable duty. *See id.*

[12] "Under the FTCA, the United States may not be held vicariously liable. However, [peculiar risk] liability has been construed as creating direct liability for the government's nondelegable duty to ensure that the contractor employs proper safety procedures." *Edison*, 822 F.3d at 518 n.4 (alteration in original). Thus, where an employer has delegated some responsibilities to an independent contractor, the employer may still be liable if the delegated responsibilities were "nondelegable" because the work performed is "inherently dangerous" or presents a "peculiar risk." *Id.* at 518 & n.4.

[13] Engelstein's argument that AASHTO standards bind the United States to a nondelegable duty of safety is meritless. AASHTO is a private organization that promulgates industry best-practices—it does not have the force of law. Engelstein's argument sounds in a breach of contract analysis, not a tort analysis.

construction of a road was not an abnormally dangerous activity); *see also Stout v. Warren*, 176 Wn. 2d 263, 273, 290 P.3d 972 (2012) (setting forth the four factors to consider in assessing whether an activity poses a peculiar risk); *Hansen v. Horn Rapids O.R.V. Park of the City of Richland*, 85 Wn. App. 424, 433, 932 P.2d 724 (1997) (stating that "employment of emergency medical personnel does not involve a peculiar risk of harm").

Second, Engelstein does not argue that ACI and OldCastle performed the work in an unsafe manner. Instead, Engelstein seeks to impose vicarious liability on the United States for the allegedly negligent acts of the independent contractor and/or its subcontractor. Unless, however, a contractor performs work in an unsafe manner, which might lead to direct liability against the United States, the FTCA expressly precludes the imposition of vicarious liability against the government for the actions of independent contractors. *See McCall v. U.S. Dep't of Energy*, 914 F.2d 191, 195 (9th Cir. 1990) (rejecting argument that government can be held vicariously liable for negligence of independent contractors under state-law "nondelegable duty" doctrine); *Lentz*, 2018 WL 3416993, at *4 ("Plaintiff's argument fails to address the fact that state law cannot preempt the FTCA if the state law imposes strict liability on the Government." (citing *inter alia Bramer v. United States*, 595 F.2d 1141, 1144 n.7 (9th Cir. 1979))).

Finally, as to Engelstein's premises liability theory, Engelstein describes a nondelegable duty owed by a possessor of land under Arizona and California law. Pl's Resp. Br. at 20–22. This doctrine does not apply here because (i) the United States was not a possessor of land—the County owns the Road; (ii) the duty in this case is governed

by Washington law, and Arizona and California law is inapplicable; and (iii) Arizona and California law impose strict liability on the possessor of land for the harm caused by the negligence of a contractor to maintain it safely, which cannot apply with respect to the FTCA's limited waiver of sovereign immunity. *See Lentz*, 2018 WL 3416993, at *4. The United States has thus carried its burden as to the independent contractor exception, and the United States is entitled to dismissal for lack of subject matter jurisdiction.

b. Discretionary Function Exception

Engelstein appears to also or alternatively allege that the United States is directly liable for his injuries because the United States negligently approved the design for the low water crossings. The United States argues that its decisions about the low water crossings are protected by the discretionary function exception to the FTCA's waiver of sovereign immunity. The discretionary function exception precludes liability for the performance or nonperformance of "a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680; *see also Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996). The discretionary function exception applies regardless of whether the government agent was negligent in his or her duties, so long as those duties were discretionary. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989). For the exception to apply, the challenged action must be both (1) discretionary—i.e., not compelled by statute, policy, or regulation, and (2) the type of action Congress meant to protect—i.e., an action that "involves a decision susceptible to social, economic, or political policy analysis." *Whisnant v. United States*, 400 F.3d 1177, 1180–81 (9th Cir. 2005); *see also United States v. Gaubert*, 499 U.S. 315,

322 (1991) ("The exception covers only acts that are discretionary in nature, acts that 'involve an element of judgment or choice.'").

Here, the alleged conduct is discretionary—no statute, policy, or regulation required the FHWA to adhere to a particular design for the low water crossings or prohibited it from delegating design duties to an independent contractor. *See* Exs. H–K to Johnson Decl.; *see, e.g., Williams v. United States*, 50 F.3d 299, 309 (4th Cir. 1995) ("The regulations . . . do not prescribe a course of action, but impart to the United States the discretion to exercise judgment and choice to contract for the maintenance of premises it occupies.") (cited with approval by *Munger v. U.S. Soc. Sec. Admin.*, No. C19-5571, 2020 WL 6874792, at *2 (W.D. Wash. Nov. 23, 2020)). Although Plaintiff argues that the AASHTO guidelines, incorporated by the Contract, mandated a particular course of conduct, no statute, policy, or regulation required the FHWA to comply with the AASHTO guidelines. The choice to follow AASHTO's recommendations was itself discretionary.[14] The first prong of the discretionary function exception test is therefore satisfied.

As to the public policy analysis element, a "strong presumption" exists that "the second part of th[e] *Gaubert* test is satisfied if a court concludes that the employee was exercising discretion," *A.O. Smith Corp. v. United States*, 774 F.3d 359, 365 (6th Cir.

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[14] In any event, the AASHTO guidelines do not provide for a fixed, mandatory design for grates on a low water crossing. *See, e.g.,* Nordstrom Report at 11, Ex. 3 to Notice (docket no. 144-3 at 12) ("The gap between the drainage grate and its frame should be 1 in. (25mm) or less."). And, although a failure to follow the AASHTO guidelines might bolster a hypothetical negligence case against a defendant, that does not mean the AASHTO guidelines carry the force of law. They are no more than evidence of industry best practices.

2014) (quoting *Gaubert*, 499 U.S. at 324), as the Court has concluded above. Ninth Circuit jurisprudence, however, also requires the United States, in seeking to demonstrate that the "discretionary function" exception applies, to identify "reasonable support in the record for a court to find, without imposing its own conjecture, that a decision was policy-based or susceptible to policy analysis." *Bear Medicine v. United States*, 241 F.3d 1208, 1216 (9th Cir. 2001). Here, the United States relies on FHWA regulations that supplement the agency's policies concerning the National Highway System. *See* Defs.' Mot. at 23 (docket no. 124) (citing 23 C.F.R. §§ 625.3(a)(1)(i)–(iv) (articulating, "in addition to the criteria described in § 625.2(a)," four factors to consider in establishing design and construction standards for highways: (1) the constructed and natural environment of the area; (2) the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; (3) cost savings by taking advantage of flexibility that exists in current design guidance and regulations; and (4) access for other modes of transportation.) The United States also cites the FHWA's publications concerning (i) hydraulic design of highway culverts, and (ii) geomorphic, biological, and engineering design considerations for low water crossings as evidence that the decisions to install low water crossings, where to install them, what type to install, and/or how to design them are policy-based or susceptible to policy analysis. *See id.* (citing Ex. H to Johnson Decl. at 3, § 1.3.5; Ex. J to Johnson Decl. at 12–13). These materials support the United States' assertion that the second prong of the discretionary function standard is satisfied. Further, as indicated by the United States, in determining whether low water crossings are advantageous to the specific site, officials perform an economic evaluation,

which takes into consideration "all lifecycle costs including maintenance, repairs, user costs, and the cost of environmental impacts." Ex. J to Johnson Decl. at 11. ACI's request to redesign the grates from a diamond-pattern grate to a rectangular-pattern grate exemplifies how the grate design involved or was susceptible to economic policy analysis. *See* Ex. E to Johnson Decl. at 33–38.

The Project also involved a low-volume road on resource-sensitive public lands. "These areas have significant and diverse stakeholders, regulations, management goals, environmental resources, cultural resources, wildlife, scenic beauty and intrinsic value." Ex. I to Johnson Decl. at 5 (docket no. 125-9). Therefore, the technical work on the Road had to embrace several key project delivery objectives including, but not limited to, being respectful of the land, wildlife, and habitat, providing safe passage for travelers and wildlife, minimizing impacts to existing features in a "lightly on land" manner, and completing quality work within budget constraints, recognizing that funding is often comparatively less for low-volume roads. *Id.* The FHWA had to consider all of these goals when determining whether, where, and how to install the low water crossings.

Federal courts have determined that analogous considerations qualify as policy determinations. *See, e.g., Hager v. United States*, No. 3:19-0673, 2020 WL 2544421, at *2 (S.D. W. Va. May 19, 2020) (concluding that the design, installation, maintenance, operation, and lack of warning attending a culvert used to manage water runoff fell under the discretionary function exception); *E. Ritter & Co. v. Dep't of Army, Corps of Eng'rs*, 874 F.2d 1236, 1241 (8th Cir. 1989) (design and construction of flood control ditch was protected by the discretionary function exception). The Court sees no reason to depart

from the rationale in these cases. Both prongs of the discretionary function exception having been met, the Court lacks subject matter jurisdiction over Plaintiff's claim that the United States negligently approved the design for the low water crossings.

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) The United States' motion to dismiss, docket no. 124, having been GRANTED for the reasons set forth in this Order, Plaintiff's claims against the United States Department of Agriculture, United States Forest Service, United States Department of Transportation, United States Department of Highways, United States Federal Highway Administration, and the Western Federal Lands Highway Division of the FHWA are hereby DISMISSED for lack of subject matter jurisdiction.

(2) Plaintiff and King County having reached a settlement, *see* Notice (docket no. 176), Plaintiff's claims against King County are DISMISSED with prejudice and without costs, provided that Plaintiff may move within fourteen (14) days of the date of this Order to reinstate his claims against King County in the event that the parties are unable to perfect their settlement.

(3) Pursuant to Plaintiff's "Motion to Dismiss Extraneous Defendants," docket no. 177, which is treated as a notice of voluntary dismissal, Plaintiff's claims against the unidentified and non-appearing defendants (Does I–X and S.E.A. Construction LLC) are DISMISSED without prejudice.

(4) The parties having stipulated to dismiss Plaintiff's claims against the State of Washington, *see* Stipulation (docket no. 97), the Court having previously granted

summary judgment against Plaintiff and in favor of Active Construction, Inc. and OldCastle Precast a/k/a Oldcastle Infrastructure, Inc., *see* Order (docket no. 90), and all claims against all parties having now been resolved, the Court DIRECTS the Clerk to enter judgment consistent with the Court's rulings in this matter.

(5) The Clerk is further DIRECTED to send a copy of this Order and the Judgment to all counsel of record.

IT IS SO ORDERED.

Dated this 11th day of September, 2023.

Thomas S. Zilly
United States District Judge